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Title Insurance Policy Did Not Indemnify for Consequential Damages Such as Lost Opportunity Costs or Lost Wages, Delaware Trial Court Rules

Observing that a title insurance policy was not a general liability insurance policy or an economic loss policy, a Delaware trial court has ruled that plaintiffs suing a title insurer for breach of a title insurance policy would not be able to present damages evidence on lost wages, carrying costs, lost opportunity costs or lost earnings because the policy did not indemnify "for consequential damages."

The Case

North American Title Insurance Company ("North American") issued a title insurance policy dated as of July 25, 2014, to Mark Fansler and Linda Goldstein (together, the "plaintiffs"), with respect to property the plaintiffs owned in Wilmington, Delaware (the "Covered Premises"). The following July, the plaintiffs notified North American that the Covered Premises was landlocked due to survey mistakes.

On September 21, 2015, the plaintiffs filed a lawsuit in Delaware Chancery Court (the "Chancery Court Action") to obtain an easement for the Covered Premises.

On December 1, 2015, North American denied coverage under the title insurance policy. In denying coverage, North American contended that coverage did not exist because the right of access to the Covered Premises was not being challenged.

The plaintiffs responded to North American on May 16, 2017, contending that it had improperly denied coverage and providing notice of the Chancery Court Action.

North American replied to the plaintiffs and continued to maintain that their claim was not a covered claim under the policy. The plaintiffs obtained an easement to the Covered Premises in the Chancery Court Action and sued North American, asserting that it had breached the obligations it owed to them under the policy in that it had wrongfully denied coverage for the Covered Premises related to a lack of access to the Covered Premises.

North American asked the court to preclude the plaintiffs from introducing trial testimony or evidence concerning "Unrelated Damages," which it defined as:

- Lost wages totaling $70,000;
- Costs to obtain sewer access totaling $45,783;
- Carrying costs for the Covered Premises totaling $96,499.21;
- Lost opportunity costs totaling $22,962.52; and
- Lost earnings totaling $62,251.66.

North American also sought to have the plaintiffs' damages limited to the cost and fees they incurred in the Chancery Court Action. North American argued that this relief was warranted under Delaware law and the policy's terms and conditions.

For their part, the plaintiffs opposed North American's motion. They argued that the policy did not exclude indirect or consequential damages.

The Court's Decision

The court held that the policy did "not indemnify for consequential damages like lost opportunity or wages."

In reaching that decision, the court explained that the "plain language" of the policy allowed recovery of "actual loss or damage" and not consequential damages. It pointed out that other courts have held that this exact policy language, coupled with the policy language relating to the "difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy," did not favor an inference that the parties contemplated consequential damages. The court then said that it agreed with this analysis and it held that the policy did "not indemnify for consequential damages like lost opportunity or wages."

In the court's view, the purpose of the policy was "to protect market value up to $117,000 in the event encumbrances, liens or defects" could not be cured. Put differently, the court continued, the policy indemnified "for the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy." The court noted that the policy was "a title insurance policy" and not a general liability policy or an economic loss policy. As the court observed, the policy did "not mention consequential damages" and did "not specifically mention future profits, lost sales opportunities, wages or alike."

Accordingly, the court ruled, at trial, the plaintiffs would not be able to present damages evidence on lost wages, carrying costs, lost opportunity costs or lost earnings. With respect to "costs to obtain sewer access," the court found the record to be incomplete and said that it would allow the jury to consider those costs if the evidence presented showed it to be a "Covered Risk." If not, the court concluded, it would strike the evidence and instruct the jury not to entertain it during deliberations.

The case is *Fansler v. North American Title Ins. Co.*, No. N17C-09-015 EMD (Del. Super. Ct. Oct. 12, 2021).

Property Owner Was Not an "Insured" Under Title Insurance Policy, Pennsylvania Federal District Court Decides

The U.S. District Court for the Western District of Pennsylvania has rejected a lawsuit brought by a property owner claiming that a title insurer breached a title insurance policy by failing to indemnify the property owner in an action concerning a land dispute, finding that the property owner was not an "insured" under the policy and, therefore, that no coverage was owed.

The Case

In 2012, Tithonus Partners, a limited partnership, was formed with Tithonus GP II, LLC ("Tithonus GP") as the general partner and Hawthorne Assisted Living Partners II, LP, Richard Irwin and Loriann Putzier as the limited partners. Tithonus Partners then created three separate limited partnerships so that each limited partnership could acquire an assisted living facility. One of these partnerships was Tithonus Tyrone, LP ("Tithonus Tyrone"), which took title to an assisted living facility in Tyrone, Pennsylvania, known as Colonial Courtyard at Tyrone. The general partner of Tithonus Tyrone was Tithonus GP, which owned 0.1 percent of Tithonus Tyrone; 99.9 percent of Tithonus Tyrone was owned by the one limited partner, Tithonus Partners.

In June 2012, Tithonus Tyrone purchased three adjoining parcels of property totaling approximately 60 acres in the Tyrone Borough of Blair County, Pennsylvania. An assisted living facility was located on a portion of the land, and the rest of the land was vacant.

Tithonus Tyrone obtained a title insurance policy from Chicago Title Insurance Company, dated July 2, 2012, in the amount of $3,077,000 (the "Policy").

"Schedule A" to the Policy defined the "Insured" as "Tithonus Tyrone, LP, a Pennsylvania limited partnership." The "Definition of Terms" further identified the "Insured" as:

> (i) The term "Insured" also includes . . .
>
> > (A) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives, or next of kin; [("Section (i)(A)"]
> >
> > (B) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization; [("Section (i)(B)"] . . .

(D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title . . .

(2) if the grantee wholly owns the named Insured; [("Section (i)(D)(2)"]. . . .

In 2013, Tithonus Tyrone separated the lot on which the assisted living facility sat ("Lot 4") for refinancing with the U.S. Department of Housing and Urban Development ("HUD"). The purpose of the subdivision was to facilitate refinancing through HUD of Tithonus Tyrone's mortgage loan and to finance some capital improvements on the assisted living facility. To complete the financing, it was necessary for Tithonus Tyrone to convey the vacant land. Accordingly, Tithonus Tyrone retained title to Lot 4 and the assisted living facility, and it conveyed the 58 acres of vacant property to Tithonus Partners through a deed ("First Deed").

Tithonus Partners did not obtain a new owner's policy of title insurance on the vacant land and did not speak to anyone at Chicago Title about obtaining a new owner's title insurance policy on the vacant land identifying it as the name insured. Chicago Title did not represent to Tithonus Partners that it would be covered by the policy issued to Tithonus Tyrone.

In 2017, Tithonus Partners subdivided the 58 acres of vacant land to facilitate the sale of a small portion, Lot 5. Then, by deed dated January 30, 2018 ("Second Deed"), Lot 5 was sold by Tithonus Partners to Port Pizza, LLC ("Port Pizza").

In early 2020, Port Pizza sued Tithonus Partners and four other defendants in a Pennsylvania state court, alleging that a portion of the conveyed property had not been owned by Tithonus Partners. Tithonus Partners then submitted a claim to Chicago Title, requesting that it fully indemnify, defend and/or resolve issues pertaining to the allegations in the Port Pizza litigation. Tithonus Partners claimed it was an insured under the Policy through the First Deed delivered by Tithonus Tyrone.

Chicago Title determined that Tithonus Partners did not qualify for coverage as an insured under the Policy and it denied the claim. It explained that:

The Claimant is not an "insured" as the term is defined by the Policy. The Claimant is not the named insured identified in Schedule A of the Policy. The Claimant is not a successor to the Named Insured because the Claimant acquired the Property by grant. Finally, the Claimant is not a grantee of an insured under a deed delivered without payment because Claimant paid $22,500 to the Named Insured in exchange for the Property. As such, the Claimant does not qualify as an insured as defined under the Policy.

Thereafter, Tithonus Partners sued Chicago Title, and the parties moved for summary judgment. Chicago Title argued that, as a matter of law, it correctly denied coverage under the Policy and refused to defend Tithonus Partners in the Port Pizza litigation.

For its part, Tithonus Partners argued that summary judgment should be granted in its favor because, as a matter of law, it qualified as an insured under Section (i)(B) and Section (i)(D)(2) of the Policy.

The Court's Decision

The court granted Chicago Title's motion for summary judgment, holding that Tithonus Partners was not an insured under the Policy issued by Chicago Title to Tithonus Tyrone.

In its decision, the court first rejected Tithonus Partners' contention that it was a successor to Tithonus Tyrone by distribution within the meaning of Section (i)(B) of the Policy. The court was not persuaded by the fact that the First Deed conveying the Property from Tithonus Tyrone expressly labeled the conveyance as "a distribution to Grantee."

In reaching its holding, the court found it significant that Section (i)(B) specifically referenced successors "to an Insured" rather than "to the Title of the Insured" that was referenced in Section (i)(A). The court added that Section (i)(B) included "distribution" in a series of words that each referred to an event whereby a business entity was structurally changed (i.e., "merger," "consolidation," "reorganization") or eliminated (i.e., "dissolution"). The court then stated that "distribution," as used in Section (i)(B) had to be read consistently with its companions and that it referred to the liquidation of an entity's assets, rather than partnership distributions made in the ordinary course of business. This reading, the court ruled, was internally consistent with the provisions of Section (i)(B), and it also recognized the distinction between "successors to the Title of the Insured" and "successors to an Insured." Accordingly, the court ruled that Tithonus Partners was not an insured under Section (i)(B).

The court then considered Tithonus Partners' contention that it was an insured under Section (i)(D)(2) of the Policy. Tithonus Partners argued that the original named insured, Tithonus Tyrone, should be deemed "wholly owned" by Tithonus Partners because (i) Tithonus Partners owned 99.9 percent of Tithonus Tyrone at the time of the transfer of property, and the remaining 0.1 percent was owned by Tithonus Partners' general partner, Tithonus GP, which also was a general partner of Tithonus Tyrone, and (ii) it was impossible for a limited partnership to be 100 percent owned by one single entity in Pennsylvania as it must have a general partner and a limited partner.

The court rejected that position and ruled that although Tithonus Partners owned almost all of Tithonus Tyrone, 99.9 percent, it did not wholly own Tithonus Tyrone. Affording the term "wholly owned" used in Section (i)(D) its "ordinary and natural construction," the court concluded that the Policy "clearly and unambiguously calls for whole ownership, not nearly whole or 'effectively whole' as Tithonus Partners advocates."

The case is *Tithonus Partners II, LP v. Chicago Title Ins. Co.*, No. 2:20-cv-952 (W.D. Penn. Oct. 8, 2021).

New York Appellate Court Upholds Decision Enjoining Property Owner from Interfering with Easement

An appellate court in New York has affirmed a trial court's decision to permanently enjoin a property owner from interfering with an easement over her property.

The Case

In 1987, Maria E. Rovegno and others acquired title to real property located at 60 Middle Pond Road in Southampton (the "Property"), a flagpole lot adjacent to Middle Pond.

Thereafter, Rovegno became the sole owner of the Property. The deed to the Property contained a 20-foot easement from Middle Pond Road to Middle Pond described by certain metes and bounds.

The deed to 62 Middle Pond Road (owned by Deirdre S. Venables and Marianne M. Farrell) and the deed to 64 Middle Pond Road (owned by Edith Greenlaw) included an express right-of-way for ingress and egress to their properties described by the exact metes and bounds of the easement. The easement was the only means by which these property owners could access their properties from Middle Pond Road.

The prior deeds to 58 Middle Pond Road, a neighboring property situated on Middle Pond Road (owned by David Mambrino and Tara Hakimi Mambrino) and 63 Middle Pond Road, located across the street from the easement on the north side of Middle Pond Road (owned by John G. Himmer) granted a 20-foot right-of-way described by the exact metes and bounds of the easement over the Property to Middle Pond.

In 2014, Venables and the other neighboring property owners sued Rovegno seeking to enjoin Rovegno from interfering with their use of the easement over the Property. In their complaint, the plaintiffs alleged that Rovegno obstructed their access to the easement by planting various shrubs, trees and privet hedges, and installing cobblestone in concrete and a fence within the easement narrowing the right-of-way.

In her answer, in addition to denying the material allegations of the complaint, Rovegno asserted various counterclaims seeking, among other things, the removal of certain encroachments from the Property and damages for trespass.

The plaintiffs moved for summary judgment on their cause of action for an injunction.

The Supreme Court, Suffolk County, granted the plaintiffs' motion, and Rovegno appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that express easements are construed "to give effect to the parties' intent, as manifested by the language of the grant." The terms of the grant, the appellate court continued, "are to be construed most strongly against the grantor in ascertaining the extent of the easement." The appellate court added that the "owner of a servient estate has the right to use its land in any manner that does not unreasonably interfere with the rights of the owners of an easement."

The appellate court then ruled that the plaintiffs had established their entitlement to judgment as a matter of law on their cause of action for an injunction by submitting, among other things, "relevant deeds along with affidavits of some of the plaintiffs and a prior owner of 62 Middle Pond Road." In the appellate court's opinion, this evidence demonstrated that Rovegno had interfered with the plaintiffs' use of the easement, which was specifically described by its metes and bounds in Rovegno's deed, "as a means of ingress and egress to and from Middle Pond Road and to Middle Pond."

The appellate court concluded that, contrary to Rovegno's contention, the grant of the easement, which was subject to exact metes and bounds, rather than an undefined right of ingress and egress, prohibited her "from altering the right-of-way in the manner in which she did."

The case is *Venables v. Rovegno*, 195 A.D.3d 876 (N.Y. App. Div. 2d Dep't 2021).

Property Owner Could Not Interfere with Stipulation Over Walking Easement, New York Appellate Court Says

An appellate court in New York has upheld a trial court's decision enforcing a stipulation that prevented a property owner from locking a gate during daylight hours and otherwise unreasonably blocking public access under a walking easement to property located on the Hudson River.

The Case

In November 2000, the plaintiff, Friends of Wickers Creek Archeological Site, Inc., entered into a stipulation with Summit Landing, LLC, the predecessor in interest to the defendant, Landing on the Water at Dobbs Ferry Homeowners Association, Inc., to settle an action commenced by Summit against, among others, the plaintiff. Pursuant to the stipulation, Summit agreed to provide permanent public access to certain tracts of land it owned.

Thereafter, the plaintiff sued the defendant, alleging that it breached the terms of the stipulation by locking a gate on a footbridge that blocked access to property located on the Hudson River that was part of a walking easement in favor of the Village of Dobbs Ferry.

The defendant moved for summary judgment dismissing the complaint and, in effect, declaring that the stipulation did not prevent the defendant from locking a gate on the footbridge during daylight hours and otherwise blocking public access across the footbridge.

The Supreme Court, Westchester County, denied the defendant's motion, and it appealed.

The Appellate Court's Decision

The appellate court affirmed and remitted the case to the trial court for entry of a judgment declaring that the stipulation prevented the defendant from locking the gate during daylight hours and otherwise unreasonably blocking public access across the footbridge.

In its decision, the appellate court found that the plaintiff had established that it was entitled to judgment as a matter of law by demonstrating that the defendant's actions breached the stipulation, which required the defendant to maintain the footbridge in furtherance of the walking easement.

The appellate court explained that although the stipulation contemplated the creation of a walking easement in favor of the general public, and not only the residents of the Village of Dobbs Ferry, "that did not relieve the defendant of the obligation to maintain the footbridge in furtherance of the easement."

In the appellate court's opinion, the trial court "correctly determined that the defendant's actions in locking the gate on the footbridge," preventing access to the waterfront parcel, "were in violation of the defendant's acknowledged obligation to maintain the footbridge in furtherance of the walking easement."

Accordingly, the appellate court concluded, the trial court had to enter judgment declaring that the stipulation prevented the defendant from locking a gate on the footbridge during daylight hours and otherwise unreasonably blocking public access across the footbridge.

The case is *Friends of Wickers Creek Archeological Site, Inc. v. Landing on the Water at Dobbs Ferry Homeowners Ass'n, Inc.*, No. 2020-00724 (N.Y. App. Div. 2d Dep't Oct. 13, 2021).

New York Appellate Court Upholds Determination That Condemnation of Easement Was a "Type II" Action Under SEQRA

An appellate court in New York has upheld a decision by a town board that its decision to condemn an easement so it could access and maintain a drainage pipe was a "Type II" action under the

State Environmental Quality Review Act ("SEQRA") and, therefore, did not require a full environmental assessment.

The Case

In August 2014, Salvatore and Marlene Capitano (together, the "petitioners"), as co-trustees of the Capitano Living Trust (the "Trust"), gave written permission to the Town of Brookhaven Highway Department to "access and repair a failing drainage pipe" running through certain real property owned by the Trust.

Thereafter, the petitioners signed an application describing the project as "the repair and replacement of a failing drainage system that was compromised during [Superstorm] Sandy," during which "[t]he existing . . . pipe will be replaced and extended seaward to maintain drainage pitch."

In February 2015, the New York State Department of Environmental Conservation issued a permit for the project to "[r]emove and replace drainage pipe in place and backfill," and the project was completed.

About five years later, the Brookhaven town board considered whether to condemn the easement to enable it to access and maintain the drainage pipe. The town board determined that the proposed action was a "Type II" action under SEQRA and it directed the condemnation by eminent domain.

The petitioners then asked a court to review the town board's determination. They alleged that the project had a "significant effect on the environmental conditions" at the property and that the Type II classification was improper. The petitioners sought to compel the town to do a complete environmental review and to propose the necessary mitigation measures needed to restore the property "to its condition prior to the installation of the New Drainage System."

The Court's Decision

The court upheld the town board's determination, denied the petition and dismissed the proceeding.

In its decision, the court ruled that, contrary to the petitioners' contention, there was "no basis to disturb" the town board's determination that the proposed action was a SEQRA "Type II" action. Therefore, the court concluded, the town had "no further responsibilities" to conduct a complete environmental review.

The case is *Matter of Capitano v. Town Board of the Town of Brookhaven*, No. 2020-04314 (N.Y. App. Div. 2d Dep't Nov. 10, 2021).

New York Trial Court Rejects Property Owners' Five Easement Claims

A New York trial court, in a case arising out of a boundary dispute between owners of two parcels of property, has rejected five easement claims brought by property owners against their neighbor for adverse possession, easement by prescription, easement by estoppel, easement in gross and easement appurtenant.

The Case

Kurt and Gina Rogers (together, the "plaintiffs") and Pietro Melchiorre (the "defendant") owned abutting property on Smith Drive in Endwell, New York. The plaintiffs' property fronted on Smith Drive, while the defendant's property was located directly behind the plaintiffs' property, further from Smith Drive. Two-family homes were on both properties; the defendant lived on his property and the plaintiffs rented their property.

A sliver of land approximately 15 feet wide and 140 feet long was part of an overall area approximately 30 feet by 140 feet to the west of the plaintiffs' and the defendant's properties, upon which there was a paved driveway. The driveway served three duplexes: The plaintiffs' and the defendant's on the east, and another duplex to the western side of the driveway.

The plaintiffs had an express easement in their deed to use the driveway to access paved parking located in the rear of their property that was in front of the defendant's property.

The plaintiffs claimed that they had maintained the driveway and grass area on the eastern side of the right of way since 2005 (because it was directly in front of their building), giving rise to a claim of adverse possession. They asserted that, since at least 2017, the defendant had not permitted the plaintiffs to use the disputed portion of the driveway and the grass area. Moreover, the plaintiffs argued, the defendant had verbally abused and/or threatened the plaintiffs' prospective tenants and lawn maintenance workers, thereby impeding the plaintiffs' efforts to lease their property.

The plaintiffs also asserted that, in 2017, the defendant erected a fence along the east side of the right of way, originally leaving a four foot opening in the fence, whereby the plaintiffs could access their building. Eventually, they added, that opening was closed off by the defendant, who claimed that tenants parking in front of the plaintiffs' building interfered with the defendant's use of the driveway.

The plaintiffs filed a lawsuit against the defendant over the boundary dispute. Their complaint asserted five causes of action: adverse possession, easement by prescription, easement by estoppel, easement in gross and easement appurtenant.

The defendant moved for summary judgment. Among other things, he argued that he was the true owner of the disputed property and that a claim for adverse possession could not lie when the plaintiffs acknowledged that they were not the true owner.

The defendant also claimed that the plaintiffs were not entitled to an easement by prescription because they did not claim a right of use other than the express easement provided in their deed, which was limited to ingress and egress, and which did not include parking.

Additionally, the defendant argued that easement by estoppel did not apply because the defendant did not make any statements that the plaintiffs could use the driveway for anything other than accessing the rear parking lot and, therefore, there could be no detrimental reliance.

The Court's Decision

The court granted the defendant's motion for summary judgment.

The court first discussed the plaintiffs' claim that they had a right to the disputed property through adverse possession.

The court explained that, to sustain a claim of ownership based on adverse possession, a plaintiff had to show, by clear and convincing evidence, that its possession of the disputed property was "(1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period." However, the court noted, the plaintiffs acknowledged that they were not the rightful owners of the property in their complaint, which stated that "the Defendant is the true owner of the property in dispute."

Just as importantly, the court continued, the plaintiffs' use of the driveway was by virtue of an express easement, which permitted the plaintiffs "the use of the driveway for ingress and egress to the rear of the premises. . . . No portion of the easement herein granted shall be blocked at any time, including by vehicular parking."

Because the plaintiffs acknowledged that they were not the true owners, and because their use of the driveway was by the rights afforded them under the deed and easement, their use could not be viewed as under a claim of right, or adverse to the defendant. Accordingly, the court held, the plaintiffs' could not maintain their adverse possession claim.

With respect to the plaintiffs' prescriptive easement claim, the court pointed out that a plaintiff must show that the use of the servient property was "open, notorious, continuous and hostile for the prescriptive period." The court added that the elements for adverse possession and easement by prescription depended "on the same elements; adverse, open and notorious, continued and uninterrupted use of property for 10 years."

The court then ruled that, for the same reasons that the plaintiffs' adverse possession claim failed, their claim for prescriptive easement likewise could not be sustained. In addition, the court noted, the plaintiffs said that they had a good rapport with the defendant's predecessor in title, and that there

was never a dispute as to parking cars on the driveway. In the court's view, that would "suggest a neighborly cooperation and accommodation that would negate hostility."

The court reached the same result with respect to the plaintiffs' claim for easement by estoppel, which, it noted, "may arise when, among other things, a party reasonably relies upon a servient landowner's representation that an easement exists." Here, the court observed, the defendant submitted evidence as to the applicable deeds, showing that there was an actual easement that permitted the plaintiffs to use the driveway and that also expressly provided that the plaintiffs could not use it for parking.

The court found that the plaintiffs failed to allege that the defendants made any representations expanding on the rights specifically noted in the easement. In fact, the court continued, the plaintiffs' allegations showed that the defendant "adamantly protested the parking of cars in the driveway." Finding that the plaintiffs had not submitted any evidence that suggested that they detrimentally relied on anything that the defendant said or did, the court decided that the defendant also was entitled to summary judgment on the plaintiffs' claim for easement by estoppel.

Next, the court granted summary judgment to the defendant on the plaintiffs' causes of action for easement in gross and easement appurtenant, finding that they were "not recognized causes of action."

Finally, the court found that the fence put up by the defendant actually might be within the 15 foot wide easement area, and might technically deprive the plaintiffs (or the landowner to the west of the driveway), the full width of the easement area. However, the court said, because it did not interfere with the plaintiffs' ability to use the driveway to access the back parking lot, the defendant could install a fence. The court noted that, "a landowner burdened by an express easement of ingress and egress may narrow it, cover it over, gate it or fence it off, so long as the easement holder's right of passage is not impaired."

The court concluded that because the plaintiffs did not allege that the fence prevented them from using the driveway to access their rear parking lot, and because the express terms of the deed and right of way showed that the easement was for ingress and egress and not parking, the plaintiffs were not deprived of their ability to use the driveway for ingress and egress.

The case is *Rogers v. Melchiorre*, No. EFCA2017002497 (N.Y. Sup. Ct. Broome Cty. Sept. 28, 2021).

Property Owners May Drive ATVs on Easement Appurtenant to Their Property to Access Beach, Massachusetts Appeals Court Concludes

An appellate court in Massachusetts, affirming a trial court's decision, has ruled that property owners may drive all-terrain vehicles ("ATVs") on an easement appurtenant to their property for the limited purpose of accessing a beach in Gloucester, Massachusetts. The appellate court rejected the contention that the scope of the easement was limited to pedestrian traffic and that Massachusetts law prohibited the property owners from driving ATVs on the easement.

The Case

As the appellate court explained, the case had its origins in 1960, when Bengt Eriksson, as trustee of the Ellis Farm Trust, bought two parcels of land that he then further divided. Some of the resulting parcels fronted on a beach in Gloucester, while others did not.

In 1963, lot 10 was sold to the predecessor-in-interest to Philip J. Mazzola, as trustee of the Seventeen Wingaersheek Realty Trust. The deeds in Mazzola's chain of title stated that the premises were conveyed subject to a 15-foot wide easement "for the benefit of all persons at any time owning or leasing any part of the remaining land of the grantor, or being lawfully invited to any part of said land, to pass and repass to and from the beach area, and for all other purposes for which right of ways are customarily used."

In 1965, lot D was sold to a predecessor-in-interest to John F. and Bonita J. O'Brien. The deeds in the O'Briens' chain of title conveyed the right to use the easement on lot 10.

The easement, as described in the various deeds, was 15 fifteen feet wide and 450 feet long. It ran from Wingaersheek Road to the beach. From Wingaersheek Road to the edge of the sand dunes on the beach, the easement was a gravel path that also served as Mazzola's driveway. Where the gravel path met the sand dunes, the easement changed to a sandy area bordered on either side by beach grass. Although the easement was described in the various deeds as 15 feet wide, the sandy area was only a few feet wide, and people passing over the easement usually attempted to stay within the confines of the sandy area, thereby avoiding the beach grass.

The O'Briens contended that they could drive all-terrain vehicles ("ATVs") on the easement for the limited purpose of accessing the Gloucester beach.

Mazzola argued that the scope of the easement was limited to pedestrian traffic and that Massachusetts law (G. L. c. 90B, § 26 (*e*)) prohibited the O'Briens from driving ATVs on the easement.

Following a jury-waived trial on Mazzola's claims that the O'Briens were overburdening the easement and creating a nuisance, a Massachusetts trial court found in favor of the O'Briens.

Mazzola appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court first examined Mazzola's argument regarding the scope of the easement, agreeing with the trial judge that the scope of the easement was not limited to pedestrian traffic.

The appellate court explained that the easement existed for the benefit of those who purchased Eriksson's land, for them to use "to pass and repass to and from the beach area, and for all other purposes for which right of ways are customarily used." This language, the appellate court said, did "not expressly limit use of the easement to pedestrian traffic." It added that the "attendant facts" also did not suggest an intent to so limit use of the easement given that, when the easement was created in 1963, people commonly drove to the beach, and the easement was wide enough to accommodate vehicular traffic.

The appellate court then stated that where nothing in the easement language or the objective circumstances supported an express limitation, the easement "may be used for such purposes as are reasonably necessary to the full enjoyment of the premises to which the right of way is appurtenant." Moreover, the appellate court said, "[e]specially where the easement is 450 feet long, a distance that is difficult or impossible for some to walk, using ATVs to transport people and equipment to the beach is a reasonably necessary use."

Accordingly, the appellate court ruled, the trial judge had not erred in concluding that the scope of the easement was not limited to pedestrian traffic.

The appellate court then rejected Mazzola's argument that Massachusetts law, G. L. c. 90B, § 26 (*e*), prohibited the O'Briens from driving ATVs on the easement.

The appellate court noted that the Massachusetts statute prohibited the operation of snow and recreation vehicles on "privately-owned property" unless "the operator is the owner or lessee or an immediate family member of the owner or lessee of the property," "the owner or lessee of the property has designated the area for use by such vehicles by posting reasonable notice of such designation," or

> the operator has in his possession either a document, signed by the owner or lessee of such property or his agent, authorizing the operation of . . . such vehicle on the property by the operator or valid proof of current membership in a club, association or other organization to which express authorization for the operation of such vehicles on the property has been granted; provided, however, that such operation shall be consistent with the express authorization granted and any restriction imposed therewith.

According to the appellate court, this language permitted those who had "clear legal authority" (i.e., owners, lessees and those on designated paths or with written authorization) to operate snow and recreation vehicles on the property, and it prohibited others without that clear legal authority to be on the property from doing so. The appellate court then ruled that the statute did not prohibit the holder of an express easement – the scope of which included ATV traffic – from driving ATVs on the easement. It said that although the statutory language did not include an explicit exception for express easement holders, it did include exceptions for owners, lessees and those on designated paths or with written authorization.

The appellate court concluded that the O'Briens' deed containing the easement constituted a "document, signed by the owner or lessee of such property or his agent, authorizing the operation of . . . such vehicle on the property by the operator," within the meaning of the Massachusetts statute.

The case is *Mazzola v. O'Brien*, No. 20-P-899 (Mass. Ct. App. Oct. 15, 2021).